No. 09-1284

Supreme Court, U.S.
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In The
Supreme Court of the United States

LEONARD JAMES McSHERRY,

Petitioner,

v.

CITY OF LONG BEACH; LONG BEACH POLICE DEPARTMENT; NORMAN TURLEY AND CARTHEL S. ROBERSON, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

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Petitioner, Leonard James McSherry ("McSherry"), for his Reply In Support Of Petition For Writ of Certiorari, states as follows:

STATEMENT OF THE CASE

Statement of Additional Facts

Evidence of all alleged pretrial identifications of McSherry as the perpetrator of the 1988 kidnapping and rape of Candice, the description of the vehicle used in her abduction and the specific description of the interior of the home where the rape took place, came from police reports prepared by Respondent officer Turley ("Turley"), after the initial descriptions did not match McSherry or any vehicle or residence associated with him. Cf. Opposition at pp. 1-3.

It was only after Turley, supervised by Respondent officer Roberson ("Roberson"), became involved in the investigation and unduly suggested or coerced Candice to identify McSherry at the photo showup, that Candice identified McSherry as the "stranger" she had identified at the showup.

Turley fabricated police reports and falsely testified at McSherry's trial that Candice identified McSherry's father's yellow Mazda as the vehicle into which she was abducted and false reports and perjured testimony concerning the interior of the residence in which she was assaulted.

The Naval investigator never testified at McSherry's state criminal trial. Cf. Opposition, at 3-4. At her deposition in 2003 the investigator first testified she had little recollection of Turley's interview with Candice and could not recall any specific questions asked by Turley, nor the form of the questions.[1]

(The following additional facts are relevant to Respondents' argument at pp. 9-20 of their Opposition).

On April 16, 1988, Long Beach Police Department officers arrested John Larocco as a suspect in the case because he drove a green pick-up truck and had physical features of the suspect described in the initial witness interviews. After Larocco was arrested on April 18, Roberson determined he was not the perpetrator, found no probable cause to detain Larocco and released him on April 18.[2] On April 19, Turley conducted the showup with Candice, which included photos of McSherry and Larocco. Turley testified at his deposition that the intent of the showup was to exclude Larocco as a suspect and he merely included McSherry's photo as "filler."

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[1] The Ninth Circuit recited the same factual error concerning the trial record. See Appendix at 7.

[2] Larocco was released pursuant to Cal. Pen. Code section 849 subd. (b)(1), which provides, in part, that a peace officer may release a person from custody if he or she is satisfied "there are insufficient grounds for making a criminal complaint against the person arrested."

Approximately two years before the investigation in this case, Turley and Roberson had investigated and conducted extensive surveillance on McSherry as a possible suspect in another Long Beach sexual offense.

Turley deviated from his usual practice of having a police witness present during the questioning of a child, both on the April 19 and April 21 interviews of Candice. Turley had attended a recent "POST"[3] training session for offenses against children. In interviewing Candice, Turley did not follow the POST procedures he had learned. He also failed to record the interviews of Candice. The investigation of the kidnapping of Candice generated much local publicity and attention from the Long Beach Police Department, including its Chief. According to Turley, by April 19, after almost six weeks of investigation, there were "no possible suspects," there were "no more leads," the investigation "had come to an end."

At her deposition in December 2002, Candice testified that when Turley first showed her the photos, she picked out one photo, which was not McSherry, but Turley pointed at another photo and said something like "isn't this the guy?" Turley pointed to McSherry's photo before she did. Candice

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[3] The Commission on Peace Officer Standards and Training (POST) was established by the Legislature in 1959 to set minimum selection and training standards for California law enforcement.

also testified at her 2002 deposition that the second time she was shown photos, Turley pointed to the same picture as before and had "guidance" in picking out the photo of McSherry.

(The following additional facts are relevant to Respondents' argument on pp. 11-12 of the Opposition).

The prosecutor testified at his deposition that he determined the photo showup by Turley was not suggestive by looking at the photos without inquiring whether Turley influenced Candice's identification. The prosecutor had little or no recollection of his investigation relating to Candice's brother's descriptions. Although the prosecutor was aware that Candice's initial description of the perpetrator was contrary to McSherry's physical characteristics, he asked Candice no questions to resolve the discrepancies. The prosecutor also did not inquire into the circumstances of the purported photo identification by Candice of the yellow Mazda vehicle or her purported description of the interior of McSherry's grandparents' house. The prosecutor supported his filing decision on the alleged detailed description of the interior of the house given by Candice.

At her December 2002 deposition, Candice denied she ever gave Turley the details of the interior of the house that Turley attributed to her in his testimony at McSherry's trial. Candice testified that she was taken to a motel room; there was no blue sheet in the room, no circular mirror, no folding door, no bird; she never gave Turley the description of the interior of

the residence he attributed to her in his trial testimony.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit Conflicts With Decisions Of This Court And Decisions Of Other Circuits.

A. There Was No Probable Cause To Arrest And Prosecute McSherry.

Respondents' argument stands the probable cause requirement of 42 U.S.C. §1983 on its head. Respondents claim that, for purposes of summary judgment, probable cause for arrest and prosecution exists, even if the arrest and prosecution of the plaintiff are the result of an officer's undue suggestion or coercion of witnesses or fabrication of evidence. But an arrest based on intentionally or recklessly false statements material to probable cause violates the Fourth Amendment. *Herring v. United States*, ___ U.S. ___, 129 S. Ct. 695, 703 (2009); *Franks v. Delaware*, 438 U.S. 154, 155-156 (1978). Due process prohibits prosecution on criminal charges based on fabricated evidence. *Devereaux v. Abbey*, 263 F.3d 1070, 1074-1075 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000).

Second, Respondents' argument that Petitioner's prior record or criminal history constitute probable cause is foreclosed by *Beck v. Ohio*, 379 U.S. 89, 96 (1964), where this Court stated that to find criminal

history "constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will."

Finally, Respondent asserts the sheriff's crime lab report provided probable cause for arrest because because it concluded McSherry "was a possible donor of the semen taken from Candice's rape kit." Opposition, at p. 8. This report, which concluded McSherry "could not be excluded as the person whose semen was found," *McSherry v. City of Long Beach*, 584 F.3d 1129, 1134 (9th Cir. 2009), does not establish probable cause to arrest for summary judgment purposes. That determination is one for the jury after hearing evidence of the percentage of the male population that could have been the source of that evidence.

B. Probable Cause To Arrest And Prosecute McSherry Was Based On Fabricated Evidence Or Was Otherwise Tainted By Misconduct.

McSherry's absence of probable cause claims are based on fabrication, coercion or undue suggestion of Candice's identification of McSherry as the perpetrator, despite facts that Turley and Roberson knew or should have known establishing McSherry was innocent. The evidence presents a sufficient basis to establish a due process violation, and to avoid summary judgment. See *Devereaux v. Abbey*, 263 F.3d 1070 (9th Cir. 2001); *Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000).

Respondents mistakenly assert that McSherry's claims are based on discrepancies between the initial identifications by Candice, her brother, the independent witness Davis[4] and the subsequent photo identifications conducted by Turley. Opposition, at pp. 9-10. However, summary judgment was improper because Turley's purported reason for including McSherry's photo in the showup, as "filler," can easily be discredited by a trier of fact, since Larocco had been excluded as a suspect the day before the photo showup. The failure to observe the POST procedures learned by Turley could allow a jury to find that he intentionally ignored this training to create probable cause for the arrest of McSherry. This evidence also establishes Turley's knowledge of how to avoid suggestive interviews of children in order to obtain reliable information. The evidence could result in a jury finding he used investigative techniques that they knew or should have known would result in the conviction of an innocent person. The jury could also find that Turley and Roberson were pressured by superiors in the Long Beach Police Department and publicity about the case to find a suspect, since by April 19, the investigation "had come to an end." Finally, Candice's deposition testimony provides evidentiary basis for the jury to find that Turley fabricated, coerced and/or unduly suggested McSherry as the perpetrator using the Mazda vehicle associated with him.

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[4] See Petition at pp. 3-4.

C. The Prosecutor Did Not Exercise Independent Judgment In Filing Charges And The Decision Of The Ninth Circuit Is Contrary To Other Decisions Of Courts of Appeals.

Respondents remarkably claim the decision of the court below is not contrary to decisions of other circuits since "McSherry was arrested and charged based on probable cause untainted by police misconduct and the prosecutor conducted an exhaustive independent investigation." Opposition, at pp. 13-17.[5] The cited cases do not support Respondents' conclusion they were based on arrests or prosecutions that lacked probable cause.

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) involved a 1983 action based on the alleged fabrication of evidence by the prosecutor in his investigative capacity and the presentation of false evidence to the grand jury. As here, the fabricated evidence was the basis of arrest and prosecution.

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[5] The prosecutor's alleged "independent investigation" consisted of reinterviewing the witnesses tainted by the suggestive and coercive tactics of Turley and relying on the fabricated evidence of Candice's description of the interior of McSherry's grandparents' house in making the filing decision. McSherry presented ample evidence the prosecutor's "independent investigation" was based on Turley's suggestive interviews and fabrications and, in part, on Candice's "accurate description" of details of the interior of a place where she had never been.

In *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992), officers had probable cause for arrest, but ignored the rule of *Payton v. New York*, 445 U.S. 573, 585 (1980), that warrantless searches or seizures occurring within a person's home are "presumptively unreasonable."

Burke v. McDonald, 572 F.3d 51, 53 (1st Cir. 2009) concerned an arrest warrant based on bite mark analyses that implicated the 1983 plaintiff in a murder for which he was arrested pursuant to a warrant. The affiant did not inform the issuing magistrate of DNA analyses that excluded the plaintiff as the source of DNA collected from the victim's body.

Jones v. City of Chicago, 856 F.2d 985, 989-991 (7th Cir. 1988) involved a fabricated identification by police officers of the 1983 plaintiff that resulted in his indictment by a grand jury for murder and other violent offenses. As here, the fabricated evidence constituted the probable cause for arrest, indictment and prosecution.

In *Anthony v. Baker*, 767 F.2d 657, 659 (10th Cir. 1992), the prosecuting attorney filed a criminal information based on false information supplied by the defendant officer and was held to answer for trial at a preliminary hearing based on such evidence. As here, there was probable cause for the filing and holding the defendant to answer, but the probable cause was fabricated by the investigating officer.

The Ninth Circuit panel decision conflicts with this precedent. The court below ruled summary judgment was proper because probable cause existed for McSherry's arrest. "[B]efore McSherry was arrested, the victim on two occasions positively identified McSherry as her attacker, and also identified his father's car as the vehicle used to facilitate the crime." *McSherry v. City of Long Beach*, 584 F.3d 1129, 1134 (9th Cir. 2009). Fabricated probable cause is not probable cause.

II. The Decision Of The Ninth Circuit Conflicts With Opinions Of Other Circuits That Complaining Witnesses Are Not Absolutely Immune From Perjury.

Another panel of the Ninth Circuit has held that *Malley v. Briggs*, 475 U.S. 335 (1986), creates an exception to the absolute trial immunity of *Briscoe v. Lahue*, 460 U.S. 325 (1983), for officers who serve as the "functional equivalent" of complaining witnesses. *Harris v. Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997). The court noted "The Second, Fifth, Seventh, and Tenth Circuits have expressly concluded [ ] that law enforcement officials are not entitled to absolute immunity for false testimony when they function as complaining witnesses." *Id.*, at 1199.

Whether a police officer is a complaining witness is a question of fact. *Anthony v. Baker*, 955 F.2d 1395, 1399-1400 and fn. 2 (10th Cir. 1992). An officer's "role

in actively instigating, encouraging, and/or perpetuating" the prosecution makes him the functional equivalent of a complaining witness. *Enlow v. Tishomingo County*, 962 F.2d 501, 511-512 (5th Cir. 1992); see also *White v. Frank*, 855 F.2d 956, 959-961 (2d Cir. 1988).

The Third and Eleventh Circuits have rejected the reasoning of *Anthony v. Baker* and *White v. Frank* by refusing to read into perjury claims the complaining witness exception of *Malley*. See *Kulwicki v. Dawson*, 969 F.2d 1454, 1467, fn. 16 (3d Cir. 1992); *Rehberg v. Paulk*, 589 F.3d 1268 (11th Cir. 2010).

Respondents concede complaining witnesses have no absolute immunity for trial perjury, but contends that summary judgment was proper because Candice, not Turley, was the complaining witness since she identified McSherry. Opposition, at 22-24. But the identifications by Candice were coerced or unduly suggested and the identification of the vehicle and the detailed description of the interior of the residence were fabricated by Turley. McSherry presented sufficient evidence precluding summary judgment on a claim of absolute immunity for perjury because Turley "perpetuated" the false criminal charges against McSherry through his trial perjury as part of his "instigation and encouragement" of those charges. As in *Harris v. Roderick*, 126 F.3d at 1199, Turley's trial testimony was "a step in the overall plan." The absence of critical inculpatory evidence in Candice's unsuggested or uncoerced pretrial statements and preliminary hearing and trial

testimony create a factual issue as to Turley being a "complaining witness." Also, there can be more than one complaining witness. See *Kalina v. Fletcher*, 522 U.S. 118, 129-130, 131 (1997) (prosecutor acting as complaining witness when she certified facts in warrant as true). In *Kalina*, the prosecutor's allegedly false testimony, which was not entitled to absolute immunity, consisted partly of statements that an accused burglary suspect was positively identified "from a photo montage" by another witness. *Id.*, at 121. As here, the prosecutor's alleged false testimony related to another witness's purported identification of the plaintiff. *Id.*, at 121, 129-30. Under these circumstances, this Court found that, by personally vouching for the truth of the statements inculpating the petitioner, the prosecutor acted as a "complaining witness." *Id.*, at 131.

III. There Is A Conflict In Circuit Courts Concerning The Applicability Of *Hartman v. Moore* To Non Retaliatory First Amendment Claims, An Issue That Should Be Decided By This Court.

Respondents claim that there is no conflict in the circuits concerning the applicability of *Hartman v. Moore*, 547 U.S. 250 (2006) to constitutional torts other than retaliatory First Amendment prosecution cases. Opposition, at 26-27. Respondents are mistaken. See *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877, fn. 7 (9th Cir. 2008) (recognizing that *Hartman*'s absence of probable cause element of causation

applies to retaliatory prosecution claims and is inapplicable to "an ordinary retaliation action."); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901 (9th Cir. 2008) (same); *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006) (*Hartman* rule inapplicable where causation turns on defendant's actions alone and no "bridge" between motive and action is necessary).

Other circuits and courts have extended the *Hartman* rule beyond its original limits. See *Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) ("*Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present"); *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (*Hartman* applicable to retaliatory prosecution claims where the police officers obtained an indictment directly from a grand jury without intervening actions of prosecutor); *Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008) (*Hartman* applicable to any constitutional tort case in which the prosecutor has initiated a prosecution).

Apart from any conflict in the circuits, extending *Hartman*'s no probable cause pleading and proof requirement to other than First Amendment retaliatory prosecution claims is an additional ground for granting the Petition, because the court below "has decided an important question of federal law that has not been, but should be, settled by this Court."[6] By

[6] Rules of the Supreme Court, Rule 10(c).

extending the *Hartman* rule to all 1983 claims in which a prosecutor initiates an action, the court below has provided shelter to unconstitutional conduct by Respondent officers, committed before the existence of probable cause for arrest or after probable cause for prosecution.[7] See also Petition, at 20-22.

CONCLUSION

For all of the foregoing, Petitioner requests this Court grant the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

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[7] As explained in the Petition at 23-27 and above, even if the *Hartman* rule were made applicable by this Court to other than First Amendment retaliatory prosecution claims, McSherry presented sufficient evidence of manufactured probable cause to avoid summary judgment.